90-296

Supreme Court, U.S.
FILED
AUG 16 1990
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

LOVE CHURCH, an Illinois not-for-profit corporation,

Petitioner,

v.

CITY OF EVANSTON, an Illinois municipal corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

Does a religious group which is unable to secure a place to worship because of a religiously discriminatory city ordinance have standing to challenge that ordinance?

Does a city ordinance which prohibits any religious groups from obtaining a place of worship at any location within that city without permission from the City Council violate the Free Exercise Clause?

Does a city ordinance which allows all manner of non-religious assemblies (e.g. meeting halls, funeral parlors, hotels, community centers, art museums, theaters, sports arenas) to exist in many area of a city without prior approval from that city but requires churches, synagogues and other religious assemblies always to receive "special permission" from the City Council prior to obtaining a place of worship, violate the Equal Protection Clause?

LIST OF ALL PARTIES

Petitioner, Love Church, is an Illinois not-for-profit corporation.

Respondent, City of Evanston, is an Illinois municipal corporation.

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PETITIONER'S LODGING

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OPINIONS BELOW

The opinions and orders of Judge John Grady from the Northern District of Illinois, Eastern Division, No. 86 C 9850 are included as Appendix B-1, B-2, B-3, and B-4. B-1 and B-2 are also reported at 671 F.Supp. 508 and 671 F.Supp. 515 (1987). The opinion of Judge Bauer of the Seventh Circuit, Nos. 88 2960 and 88 3065, is included in Appendix A-1, and is reported at 896 F.2d 1082 (1990).

JURISDICTION

This Court has jurisdiction over this petition pursuant to 28 U.S.C. §1254 because Love Church has timely petitioned this Court to grant a writ to the U.S. Court of Appeals for the Seventh Circuit. On March 1, 1990 the Seventh Circuit issued an opinion. On June 13, 1990 the Seventh Circuit denied Love Church's petition for rehearing.

The District Court had jurisdiction over this matter pursuant to 28 U.S.C. §§1331 and 1343(3), because Love Church has alleged that certain ordinances of the City of Evanston violate the Church's rights under the First and Fourteenth Amendments.

CONSTITUTIONAL, STATUTORY, ETC., PROVISIONS INVOLVED

(1) The First Amendment to the United States Constitution provides, in part:

> Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof.

(2) The Fourteenth Amendment to the United States Constitution provides, in part:

> No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

(3) The City of Evanston's Zoning Ordinance, consisting of approximately 205 pages, plus a zoning map in the back pocket, is set forth in the Petitioner's Lodging, lodged simultaneously with this petition.

STATEMENT OF THE CASE

Evanston severely burdens the free exercise of religion in two distinct ways. First, it restricts free exercise by prohibiting any religious group[1] from obtaining a meeting place at any location in the city unless the City Council has given prior approval. Second, it discriminates against religious assemblies by allowing virtually every type of non-religious assembly to meet without City Council prior approval. Thus, this case involves the denial of the basic civil rights embodied in the Free Exercise and Equal Protection Clauses under the guise of the Police Power of local governments to "specially permit" real estate uses.

Churches, synagogues, and other places of religious assembly uses are never a freely permitted use in *any* district (zone) or sub-district of Evanston. Only if "specially permitted" by the City Council are they allowed in certain districts. On the other hand, non-religious assembly uses such as meeting halls, funeral parlors, restaurants, theaters, sports arenas, community centers, art museums, hotels, and recreation centers are freely permitted in various districts without City Council approval.

To obtain a special use permit a religious group must, after having secured a leasehold or ownership interest in a property, pay a fee of $370 to $480, have a Zoning Board hearing and then seek City Council approval by majority vote of the aldermen. Although the Zoning Board has general standards to apply in making recommenda-

[1] The various provisions of the zoning ordinance specify "churches" but the parties and reviewing courts have understood that term to mean "any assembly of people for religious purposes."

tions for special use permits, the City Council is not bound by those standards and can, without a hearing, accept or reject a Zoning Board recommendation. The Evanston Zoning Ordinance provides for fines up to $500 per day for all persons violating it. Landlords, tenants, property purchasers or sellers seeking rezoning must wait 4-6 months for the City Council to approve or deny a special use request.

In the year preceding the filing of the complaint Love Church was a predominantly black Pentecostal congregation consisting of about 35 members. The complaint was filed when the church was forced to move to the pastor's 900 sq. ft., two-bedroom apartment and membership had dropped to 15. During 1985 and 1986, the two years preceding the filing of the complaint, the church had rented space for Sunday worship in a variety of temporary meeting locations: a community center, a school, a hotel and a park district building. Attendance had ranged up to 250 people per service (see Appendices C-1 and C-2).

None of the temporary locations allowed for meeting or use except for specified hours on Sundays, allowed the church the ability to undertake necessary remodelling, provided an office for the Pastor, had space for storage or music equipment between services, had a telephone or mailing address, or had a regular nursery. Further, since they were all temporary locations, there was no commitment to make them available to the church on a long-term basis, i.e. for more than 90 days. While the church met at these temporary locations the City of Evanston did not take legal action to enforce the Ordinance.

During most of 1986 the church endeavored to secure a permanent meeting place but was prevented from doing so because of the zoning provisions relating to churches.

Under the Evanston zoning procedures, which are similar to that of most communities, a landlord considering renting to a tenant who needs "special permission" must take his property off the market for the time the permit request is pending and risk denial of the permit. A landlord deciding to rent to a tenant whose use is "permitted", for example a non-religious assembly use such as a meeting hall or business office, takes no risk of denial and has no waiting time. In the Evanston Business and Commercial zones, 60-80 uses are "permitted" and do not need special approval. On four separate occasions Love Church located facilities which were affordable and suitable for its needs.[2] On each occasion, leasing agents refused to risk renting to the church because churches were not a *permitted* use within the zone where the property was located and the church would need "special permission" from the City Council. The landlords refused to take the spaces off the market pending a "special permit" proceeding.

Love Church suffered loss of basic civil rights due to the Evanston Ordinance: denial of its rights to Free Exercise and Equal Protection. Disruption of the church's ministry, discouragement, membership loss and financial loss all flowed from the discrimination. The District Court

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[2] The Court of Appeals opinion stated that the church did not say where the properties were located or what was affordable rent (App. A-1, p. 8a). Apparently the Court overlooked the affidavit (see App. C-1) attached to the complaint giving the addresses of each location, the real estate company involved in renting and the refusal of these companies to enter into a lease because of the permitting requirement, and overlooked the testimony of the Pastor at trial stating the addresses, the facilities provided at each location, the rent asked, that the church could afford the rents of each potential location, the names of individual rental agents and their companies, and dates of conversations.

found that Evanston's ordinance did not violate the Free Exercise Clause but did violate the Equal Protection Clause. After trial, the District Court awarded compensatory damages of $17,782.89 for those losses directly caused by the Equal Protection violation.

REASONS FOR GRANTING THE WRIT

PREAMBLE

"The assembly of a community of believers is an integral part of most religious faiths . . ."[3] While this freedom is relatively secure to many who choose to worship in the large, influential, and established congregations of our nation, those who meet in small groups by choice, those who follow new faiths, those who dissent from existing religions, or those who, because of ethnic or racial characteristics of their congregation, are a minority, are not secure. Such groups are part of the heritage, essence and future of America. They worship God, protest when the school board eliminates the kindergarten program, provide a home for the battered wife and her children to stay in, offer a family to the lonely fellow from Nebraska, and make mushroom chicken casseroles for pot-luck dinners. To many of these Americans their community of faith suffuses their lives. They need the U.S. Supreme Court to protect their freedom to obtain a place to worship without begging the permission of zoning boards and city councils which can be influenced by fear, prejudice, or

[3] *Islamic Center of Mississippi, Inc. v. City of Starkville*, 840 F.2d 293, 300 (5th Cir. 1988).

politics and which can arbitrarily withhold permission. They need the Court to allow them to compete in the real estate market for meeting places on the same basis as other assemblies such as political parties, literary groups, funeral businesses, labor unions and sports enthusiasts. This Court has applied the Equal Protection Clause to restrict the "special permitting" of homes for the mentally retarded (*City of Cleburne, Texas v. Cleburne Living Center*, 473 U.S. 432 (1985)). It is time for the Court to rule that the same protection from the "special use" procedures is due under the Free Exercise or Equal Protection clauses to the far more numerous religious congregations.

THERE IS A CONFLICT AMONG THE CIRCUIT COURTS OF APPEAL.

The Courts of Appeal are in conflict on the extent to which free exercise of religion is protected against the burden of "special permits."

The Fifth Circuit has held that requiring a special use permit to establish an Islamic Center in a residential area of Starkville, Mississippi impermissibly burdened the Islamic Center and thus violated the Free Exercise clause. *Islamic Center of Mississippi, Inc. v. City of Starkville*, 840 F.2d 293 (5th Cir. 1988). However, in *Lakewood, Ohio Congregation of Jehovah's Witnesses v. City of Lakewood, Ohio*, 699 F.2d 303 (6th Cir. 1983), the Sixth Circuit held that denial of special permission for a church to build in a single-family residential area did not violate the Free Exercise Clause. In *Christian Gospel Church, Inc. v. City and County of San Francisco*, 896 F.2d 1221 (9th Cir. 1990), the Ninth Circuit held that denial of a special use permit for a church which desired to conduct "home worship" in a residential area did not violate free exercise

or equal protection freedoms. In *Messiah Baptist Church v. County of Jefferson*, 859 F.2d 820 (10th Cir. 1988), over vigorous dissent, the Tenth Circuit held that a church which was denied special permission to construct a new facility in an agricultural district did not have its free exercise or due process rights violated. And in *Grosz v. City of Miami, Florida*, 721 F.2d 729 (11th Cir. 1983), the court held that the Free Exercise clause did not protect a small congregation of orthodox Jews which sought special permission to meet in a home.

Both the Tenth and Eleventh Circuits appear to be appealing for Supreme Court guidance in this area; the Tenth Circuit in *Messiah Baptist* quotes the Eleventh Circuit in *Grosz*:

> "[I]nterpretation and application of the free exercise clause has created, within the field of constitutional doctrine, areas dotted by unanswered questions." (859 F.2d at 824)

This Court should accept this case, resolve the conflict between the Fifth Circuit and the other circuits, and resolve the crucial unanswered questions of constitutional doctrine raised in this case.

A RELIGIOUS GROUP WHICH CANNOT SECURE A PLACE TO WORSHIP BECAUSE OF A RELIGIOUSLY DISCRIMINATORY LAW CAN CHALLENGE THAT LAW.

The District Court found that the Evanston ordinance is "not even rationally related to a legitimate interest" (App. B-2, p. 38a), and that Love Church suffered specific damages because of that Ordinance (App. B-4), yet the Seventh Circuit ruled that Love Church lacked standing to challenge the ordinance. The Seventh Circuit, in *Love Church v. City of Evanston*, 896 F.2d 1082 (1990), concluded that even though hotels, meeting halls, music

schools, funeral homes, and movie theaters are permitted uses and churches are not, religious organizations are not "singled out" (App. A-1, footnote 3 and p. 10a) because "Evanston's special permit requirements apply not only to religious facilities but to art galleries, libraries and museums as well."[4] Thus, the Seventh Circuit has manufactured a new test never found in Supreme Court opinions, for whether a "category" based upon religion has been formed: assemblies of people for worship can be required to obtain prior City Council permission as long as some other non-religious "assembly" such as a library is similarly treated. Does this mean that a law applying *explicitly* to females is not gender based if it also applies to teenage boys? Does a law requiring "blacks and persons over 60" to obtain a permit to construct a house no longer contain a racial categorization? If a zoning ordinance required persons of a certain race to obtain City Council permission to locate in a city, these persons would obviously have standing to challenge the ordinance on its face. In Evanston, "religious assemblies" must always have City Council permission, but, according to the new Seventh Circuit rule, have no standing to complain of the denial of free exercise or equal protection freedoms imposed by that burden. The Supreme Court should grant the Certiorari Petition to correct this irrational interpretation of standing.

The Seventh Circuit also said Love Church lacked standing because it could not "reasonably assert that it fears enforcement." (App. A-1, p. 9a) That reasoning ignores the reality of the real estate marketplace where the self-enforcing features of the special use permit requirements

[4] Apparently the Court overlooked that *art museums* are permitted uses in several districts.

are all too painful. In four specific instances, landlords refused to enter into a lease due to the special use requirement (see App. C-1 and C-2). Not only did landlords in this case obviously refuse to rent because they feared enforcement, but no building permit will issue (even to put in a washroom) without the special use permit being in place.

Thus, because a city is not actually threatening to sue (because it does not need to), the Seventh Circuit is prohibiting parties from challenging an ordinance which, in effect, devastates them. If this distortion of federal law is allowed to stand, many other groups which are seriously hurt by zoning laws will have no redress. If Certiorari is granted on this point, Petitioners will argue in greater detail the self-enforcing aspects of the special use permit process and will discuss the anomaly of a church which has *proved* $17,782.89 in damages from an invalid ordinance being denied standing because it is deemed not to have suffered any real injury.

AN ORDINANCE WHICH CONDITIONS THE RIGHTS OF RELIGIOUS ASSEMBLY UPON PRIOR CITY COUNCIL PERMISSION VIOLATES THE FREE EXERCISE CLAUSE.

Can a city totally prohibit places of worship from within its boundaries absent "special permission" from the aldermen? If Love Church has standing, this is an issue squarely presented. Because the Court of Appeals held Love Church lacked standing, it never reached this question. Probably thousands, perhaps tens of thousands of villages, cities and counties lack a zone where religious groups are freely permitted! The deciding of this case will touch for generations the lives and hearts of uncountable individuals, families, congregations and communities who

will or will not be able to meet, have community and worship God together because of the court's decision.

AN ORDINANCE WHICH FREELY PERMITS NON-RELIGIOUS ASSEMBLIES BUT REQUIRES RELIGIOUS GROUPS ALWAYS TO OBTAIN SPECIAL PERMISSION TO OBTAIN A PLACE OF WORSHIP VIOLATES THE EQUAL PROTECTION CLAUSE.

When deciding permits on a case-by-case basis, zoning boards and city councils assume a function far more judicial than legislative in essence. Yet if the decision making process involves the religious freedoms of unpopular or misunderstood groups, if the Pastor has spoken out against corruption in City Hall, or if the decision makers must answer to an electorate of neighboring homeowners who may focus only on "property value" fears, precious First Amendment freedoms will be ignored. Love Church was painfully discriminated against and the Seventh Circuit refused to hear its complaint. Other religious groups are being hurt by abuse of the special permit process.[5] Granting of Certiorari will allow the court to examine and possibly heal some of those hurts.

CONCLUSION

While there are many injustices to correct, to the great majority of municipal officials Equal Justice Under Law is profoundly meaningful. Many municipalities are search-

[5] It is instructive to note that of the six congregations cited as having cases before the Courts of Appeal, only Messiah Baptist appears to be from a well-established or influential faith. All the others are minority and/or unorthodox in religion. Three or four also appear to involve ethnic or racial minorities.

ing for fair and rational ways to zone assembly uses based upon land use rather than "content of assembly" considerations, but in the Village Halls of America confusion reigns when the First Amendment is mentioned. Municipalities need help, religious groups need help, the Courts of Appeal are asking for help and Love Church implores your intervention. Granting of Certiorari in this case presents the court with an opportunity to establish an Ebenezer for all these Americans of good will.

Respectfully submitted,

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APPENDICES

APPENDIX A-1

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 88-2960 and 88-3065

LOVE CHURCH, an Illinois not-for-profit corporation,

Plaintiff-Appellee,
Cross-Appellant,

v.

CITY OF EVANSTON, an Illinois municipal corporation,

Defendant-Appellant,
Cross-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 86 C 9850—**John F. Grady,** *Judge.*

ARGUED SEPTEMBER 6, 1989—DECIDED MARCH 1, 1990

Before BAUER, *Chief Judge*, and CUDAHY and KANNE, *Circuit Judges.*

BAUER, *Chief Judge.* The City of Evanston appeals a judgment providing injunctive relief and monetary damages to the Love Church under 42 U.S.C. § 1983 for violations of the right to equal protection under the fourteenth amendment. Appellants argue that Love Church lacked standing to bring this claim and, in the alternative, that summary judgment for plaintiffs was inappropriate. Appellees have filed a cross-claim declaring that the injunctive relief granted was too narrow to address properly

the alleged injury suffered by Love Church. Because we find that plaintiff lacked standing to bring this action, we vacate the judgment below and remand with directions to dismiss this claim.

I.

Marzell Gill founded Love Church, a fundamentalist, Pentacostal Church, in Evanston, Illinois, in June of 1985.[1] Pastor Gill and his family began holding services at the Fleetwood-Jourdaine Community Center, a city-owned facility, in the summer of 1985. Approximately eleven people, including Pastor Gill's family, attended these meetings. Later services were moved to an auditorium in the Washington School in southwest Evanston. Six people attended these services. When school began in September of 1985, the Gills moved their church to a meeting room in the Evanston Holiday Inn. The Love Church continued to meet in the Holiday Inn until March of 1986. The final service held there, Easter Sunday of 1986, attracted 250 people, the highest attendance the church was ever to achieve.

From March through October of 1986, Pastor Gill held services at the Ridgeville Park District in south Evanston. Attendance at this site averaged 35 to 40 people each Sunday. During that time, Gill began to look unsuccessfully for permanent facilities for his congregation. In the fall of 1986, the Ridgeville Park District informed Gill that the rent would be increased. Gill also testified that Ridgeville authorities informed him that they would require a

[1] The district court described Love Church as a "congregation comprised of approximately 30 young 'working class' black men and women residing in and around Evanston." *Love Church v. Evanston*, 671 F.Supp. 508, 509 (N.D.Ill. 1987) (footnote omitted). The court further noted that Love Church "is not affiliated with any denomination, although it believes in traditional Christian teachings." *Id.* Appellees brief, however, describes Love Church as Pentacostal in nature. The discrepancy is immaterial for purposes of this appeal.

city permit for future church use of the facilities even if this use was only temporary. Gill, however, never applied for the permit. In November and December of 1986, the Love Church held its services in the Gills' two-bedroom apartment in Evanston. Finally, in January of 1986, the Love Church began meeting in the Skokie Holiday Inn.

On December 17, 1986, Pastor Gill and the Love Church filed the complaint from which this appeal stems. The complaint alleged that the Evanston Zoning Ordinance requiring churches to apply for special use permits had made it impossible for the Love Church to secure permanent meeting facilities.

The Evanston Zoning Ordinance (the "Ordinance") does not limit the location of church facilities to specifically designated areas. Ordinance §§ 6-5-2(b); 6-7-2-2; 6-7-3-16(B).[2] Rather, a church, synagogue, or other religious institution may be located anywhere in the city, regardless of the underlying zoning purpose, provided the interested parties apply for and receive a special use permit. *Id.*[3] To secure a permit, an applicant must file a detailed plan for the use of the facilities and pay a fee of between $370 and $480. *Id.* The Evanston Zoning Board then holds a hearing and issues a decision. § 6-12-4(B). The entire process takes between four and six months. The Ordinance provides for misdemeanor fines of $25 to $500 a day for each violation. § 6-11-13.

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[2] By contrast, some public facilities in Evanston are confined to designated "commercial" or "manufacturing" sections of the city under the Evanston Zoning Ordinance. These include hotels, meeting halls, music schools, funeral homes, and movie theatres. While these facilities do not require special use permits to operate, they may operate in only limited designated areas. *See Love Church*, 671 F.Supp. at 514.

[3] Churches are not singled out for this treatment. Evanston also requires special use permits for libraries, museums, and art galleries. Ordinance §§ 6-5-2(b); 6-7-2-2; 6-7-3-16(B); *See also Love Church*, 671 F.Supp. at 510 & n.3.

Love Church and Pastor Gill claimed that, due to the requirements of the Ordinance, they were unable to obtain a lease for their church. Thus, they filed suit under 42 U.S.C. § 1983 for injunctive relief, declaratory judgment and compensatory damages. Plaintiffs alleged, *inter alia*, that Evanston had violated their first amendment right to the free exercise of their religious beliefs as well as their rights to equal protection and due process under the fourteenth amendment. Evanston subsequently filed a motion to dismiss these claims.

On March 3, 1987, Judge Grady issued a memorandum opinion partially granting Evanston's motion to dismiss. Initially addressing the question of standing, Judge Grady held that the Love Church had alleged sufficient economic hardship under the Ordinance to establish standing. However, Pastor Gill was dismissed as a plaintiff for lack of standing since his claims simply derived from the independent claims of his church. Explaining its reasoning, the district court stated:

> Evanston's ordinance is presumptively valid. *Cosmopolitan National Bank v. County of Cook*, 116 Ill. App.3d 1089, 1094, 452 N.E.2d 817, 822 (1st Dist. 1983). Plaintiffs have neither leased property nor applied for a special use permit. We presume Evanston will fairly apply the ordinance; if plaintiffs apply for a permit at an appropriate site, a permit presumably will issue.

671 F. Supp. at 511. Turning to the remaining substantive claims, the district court dismissed plaintiff Love Church's first amendment and due process challenges. The equal protection claims, however, were allowed to stand. Judge Grady then directed Evanston to provide a justification for the disparate treatment of religious organizations under its Ordinance.

Following additional briefing by the parties, the court entered summary judgment for plaintiffs on the equal protection claims on September 3, 1987. *Love Church v. Evanston*, 671 F.Supp. 515 (N.D.Ill. 1987). The court held

that Evanston improperly applied a different set of zoning requirements to churches and religious facilities than similarly situated facilities such as movie theatres, funeral homes, hotels, and community centers. These buildings, the court stated, were capable of creating the same traffic, parking, and safety concerns as churches, yet they were not required to obtain special use permits. Evanston had not provided a compelling justification for this distinction. Thus, Love Church's right to equal protection was violated. The court then requested additional briefing prior to determining damages or any injunctive relief.

Complicating the court's assessment of the appropriate relief was Love Church's continued inability to secure permanent facilities. The court noted with some frustration at a hearing on September 22, 1987:

> We do not want . . . this case for their own entertainment. This is a real life lawsuit. I have treated it as one from the beginning and I still regard it as such. So let's get down to brass tacks and see what it is you people (Love Church) want to do.

On March 15, 1988, nearly 15 months after the onset of this litigation, Love Church finally entered into a lease for space at 823 Davis Street in Evanston. The district court entered an injunction on that date barring Evanston from requiring a special use permit at that site.

Finally, on August 22, 1988, following several days of hearings and additional briefing by the parties, the court assessed damages against Evanston in the amount of $17,782.89. In his memorandum opinion, Chief Judge Grady noted that, in determining the level of damages in this case, "(m)ore than the usual degree of speculation is involved." Nonetheless, the district court held that a reasonable estimate was possible and found that Love Church was entitled to these damages as compensation for lost contributions, musical services and the costs of general disruption and inconvenience. Evanston subsequently appealed this judgment. For the following reasons we now vacate that judgment.

II.

Our threshold determination on this appeal is whether plaintiff Love Church has proper standing to bring this suit. As the Supreme Court has firmly stated, "of one thing we may be sure: Those who do not possess Art. III standing may not litigate as suitors in the courts of the United States." *Valley Forge College v. Americans United for the Separation of Church and State*, 454 U.S. 464, 475-6 (1982). Constitutional standing is limited to actual "cases" or "controversies." For, as has often been recognized, "Federal courts are not courts of general jurisdiction; they have only the power that is authorized by article III of the Constitution and the statutes enacted by Congress pursuant thereto." *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541 (1986). If such a case or controversy is lacking, the district court cannot properly exercise jurisdiction, and our role on appeal is merely to correct this error—we may not reach the merits. *Bender*, 475 U.S. at 541; *Foster v. Center Township of LaPorte County*, 798 F.2d 237, 241 (7th Cir. 1986). In its initial memorandum opinion in this matter, the district court held that Love Church had standing to litigate its claim. For the reasons explained below, we disagree.

The concept of standing does not lend itself easily to strict rules and facile application. Yet, the Supreme Court has recognized certain constitutional and prudential limitations on its exercise. *See Warth v. Seldin*, 422 U.S. 490, 498 (1975). As the Court stated in *Valley Forge*

> at an irreducible minimum, article III requires the party who invokes the court's authority to 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant,' *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979), and that the injury 'fairly can be traced to the challenged action' and 'is likely to be redressed by a favorable decision,' *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38,41 (1976).

454 U.S. at 472. *See also Franchise Tax Board of California v. Alcan Aluminium Limited*, 58 U.S.L.W. 4121, 4122 (1990); *Meese v. Keene*, 481 U.S. 465, 476 (1987); *Bender*, 475 U.S. at 542; *Frank Rosenberg, Inc. v. Tazewell County*, 882 F.2d 1165, 1168 (7th Cir. 1989). In order to make our determination on the issue of standing, therefore, we must focus on the qualifications of the party bringing the suit rather than the underlying merits of the case. Our review of the district court's determination of standing is *de novo*. *See Frank Rosenberg, Inc.*, 882 F.2d at 1167; *Waste Management, Inc. v. Weinberger*, 862 F.2d 1393, 1396 (9th Cir. 1988). Further, we are required, as was the district court in reviewing a motion to dismiss for want of standing, to "accept as true all material allegations in the complaint, and construe the complaint in favor of the complaining party." *Warth v. Seldin*, 422 U.S. 490, 501 (1975); *Frank Rosenberg, Inc.*, 882 F.2d at 1167-8 (7th Cir. 1989).

Reviewing the facts before us with these principles in mind, we must determine whether Love Church has (1) suffered personal injury; (2) fairly traceable to the defendant's allegedly unlawful conduct; and (3) likely to be redressed by the requested relief. *Allen v. Wright*, 468 U.S. 737, 751; *Frank Rosenberg*, 882 F.2d at 1168; *FMC Corporation v. Boesky*, 852 F.2d at 987; *Shakman v. Dunne*, 829 F.2d 1387, 1394 (7th Cir. 1987). The Supreme Court has also noted that plaintiff's alleged injury must be more than a generalized grievance. *See Valley Forge*, 454 U.S. at 475. The complaint must describe a "distinct and palpable" injury. *See Meese v. Keene*, 481 U.S. 465, 472 (1987); *Warth*, 422 U.S. at 490; *Frank Rosenberg, Inc.*, 882 F.2d at 1168-9; *see also Freedom from Religion Foundation, Inc. v. Zielke*, 845 F.2d 1463, 1467 (7th Cir. 1988). Plaintiff cannot allege harm which is merely "abstract" or "conjectural" or "hypothetical." *See Los Angeles v. Lyons*, 461 U.S. 95, 101-2 (1983); *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974).

Love Church claims that due to the Evanston Zoning Ordinance, they have been unable to locate permanent

facilities for their congregation. In support of this allegation, Love Church offers the affidavit of Pastor Gill stating that on four occasions suitable rental properties were unavailable solely due to the technical requirements of the special use permit. Gill's affidavit does not set forth where these properties were located. Nor does he explain what constitutes "affordable" rent. Significantly, the record does not contain any affidavits from landlords refusing to rent to Love Church. Even accepting Pastor Gill's allegations as true, as we must, they simply do not demonstrate a "distinct and palpable injury" for purposes of establishing standing.

The Supreme Court discussed the economic ramifications of zoning decisions in *Warth v. Seldin*, 422 U.S. 490 (1974). In *Warth*, petitioners claimed that due to the exclusionary policies of Penfield, New York, they were unable to obtain low- and moderate-income housing in that municipality. Accepting as true petitioners allegations of exclusionary acts by local officials, the Court denied standing, stating:

> Petitioners here . . . rely on little more than the remote possibility, unsubstantiated by allegations of fact, that their situation might have been better had respondents acted otherwise, and might improve were the court to afford relief.

422 U.S. at 507. Similarly, Love Church relies on the mere possibility that, absent the Ordinance, it could have more easily acquired rental property in Evanston. Such speculative claims cannot constitute distinct and palpable injury for purposes of standing. Claims of such vague economic harm are precisely the type of "abstract" or "conjectural" allegations spurned by the Supreme Court in *Warth*. Love Church never applied for a special use permit, nor was threatened with punishment for operating a church facility in violation of the Ordinance. Thus, any alleged fear of enforcement or increased difficulty in securing housing does not present any real controversy before the court.

Love Church has undoubtedly had difficulty acquiring rental property for its ministry and congregation. This difficulty has caused much hardship and inconvenience for all concerned. Yet, even accepting this as "injury" for purposes of standing, Love Church has failed to show how its claim satisfies the second prong of the standing inquiry, i.e. that this injury "fairly can be traced to the challenged action." *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38 (1976); *see also Valley Forge*, 454 U.S. at 472. Evanston has never enforced this ordinance against any religious organization. There are over 70 churches currently holding services within the city limits. Love Church met at five locations within Evanston prior to this litigation without any objection from the city. One location, the Fleetwood-Jourdaine Community Center, was, in fact, a city-owned facility. Moreover, Love Church never even applied for a special use permit. Plaintiffs correctly assert that such application may not be necessary to establish standing. *Entertainment Concepts III v. Macjewski*, 631 F.2d 497 (7th Cir. 1980). In *Macjewski*, however, we held that a party must "reasonably assert that it fears enforcement" in order to establish constitutional standing. *Id.* at 500. Here, given Evanston's historic policy of non-enforcement and Love Church's repeated violation of the Ordinance without any municipal retaliation, plaintiffs cannot reasonably assert that they fear enforcement.

Finally, Love Church has failed to demonstrate that the alleged injury "is likely to be redressed by a favorable decision." *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. at 41 (1976). The possibility that Love Church would be better able to locate rental property absent the special use requirements of the Ordinance is wholly conjectural. Pastor Gill, by his own admission, spent over 14 months trying to rent property. Despite repeated attempts, he was unable to obtain a lease. According to his affidavit, on four occasions an "affordable" lease was available but for the provisions of the Ordinance. At other times, Gill complained that potential landlords would not include a contingency clause providing for

the termination of the lease if a special use permit was not issued by the city. Significantly, Gill does not contend that no contingency clause was available, but merely that the requirement of one increased the price of a lease. Presumably, Gill could have obtained such a clause if he was willing to pay the cost of one.

Yet whatever specific difficulties Gill claims to have encountered, they are the same ones that face all rentors, not merely churches. The harsh reality of the marketplace sometimes dictates that certain facilities are not available to those who desire them. Evanston's special permit requirements apply not only to religious facilities but to art galleries, libraries, and museums as well. If Evanston were enjoined from enforcing its Ordinance, an Ordinance they have never enforced to begin with, there is simply no indication that Love Church could have obtained rental property more easily. Indeed, when Pastor Gill finally secured a location for Love Church at 823 Davis, the injunction had not taken effect. Beyond this, services were held at five locations in Evanston without any compliance with the Ordinance. When Love Church vacated these sites it was for reasons unrelated to the Ordinance. Clearly, Gill was able to locate property for his ministry in the face of this Ordinance, and any attendant difficulties were those suffered by any under-financed rentor.

As Love Church states quite eloquently in its brief:

> New churches do not spring "full blown" into existence as enormous congregations with huge choirs and imposing tabernacles. Many churches start as groups meeting in homes or local schools. Then they become large or stable enough to lease or purchase a small permanent facility. In time the congregation may establish a building fund to erect a facility. Some congregations never progress beyond certain levels while others shrink and consolidate.

Love Church, unfortunately, stumbled on the path to an "enormous congregation." With over 70 churches, Evanston is a difficult religious market in which to negotiate such a path. But any allegation that Love Church foun-

dered due to the long shadow of a dormant Evanston Zoning Ordinance is far too speculative to find a hearing in the federal courts. As the Supreme Court stated in *Warth*:

> (P)etitioners' descriptions of their individual financial situations and housing needs suggest . . . that their inability to reside in Penfield is the consequence of the economics of the area housing market, rather than of respondents' assertedly illegal acts.

422 U.S. at 506. Similarly, Love Church suffered an alleged crisis within its congregation, not because of Evanston's purportedly harsh requirements for religious institutions, but rather because they lacked the wherewithal to locate rental property. No injunction could undo this hardship. No federal court can address this situation.[4]

III.

Love Church has failed to allege a "distinct and palpable" injury fairly traceable to Evanston's actions or properly redressable by a favorable ruling. We, therefore, hold that it lacks constitutional standing to sue. As there is no "case" or "controversy" at issue for resolution by the federal courts, the district court had no jurisdiction to hear this complaint. The judgment below is VACATED, and we now REMAND with directions to DISMISS the claim.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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[4] Because we hold that Love Church has not presented a "case" or "controversy" sufficient to establish constitutional standing under Article III, we do not reach the prudential limitations on standing recognized by the Supreme Court. *See Freedom from Religion Foundation, Inc. v. Zielke*, 845 F.2d 1463 (7th Cir. 1988) (where constitutional standing is not established prudential limitations need not be explored).

APPENDIX A-2

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

June 13, 1990.

Before

Hon. WILLIAM J. BAUER, *Chief Judge*
Hon. RICHARD D. CUDAHY, *Circuit Judge*
Hon. MICHAEL S. KANNE, *Circuit Judge*

Nos. 88-2960
88-3065

LOVE CHURCH, an Illinois not-for-profit corporation,

Plaintiff-Appellee, Cross-Appellant,

vs.

CITY OF EVANSTON, an Illinois municipal corporation,

Defendant-Appellant, Cross-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 86 C 9850—**John F. Grady**, *Judge.*

ORDER

The plaintiff-appellee Love Church filed a petition for rehearing and suggestion for rehearing en banc on March 14, 1990. No judge in regular service has requested a vote on the suggestion for rehearing en banc, and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

APPENDIX B-1

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 86 C 9850

LOVE CHURCH, an Illinois not-for-profit corporation, and MARZELL GILL, an individual,

Plaintiffs,

v.

CITY OF EVANSTON, an Illinois municipal corporation,

Defendant.

MEMORANDUM OPINION

This case is before us on the motion of plaintiffs Marzell Gill ("Gill") and Love Church, Inc. ("Love Church") for summary judgment pursuant to Federal Rule of Civil Procedure 56 and the motion of defendant City of Evanston ("Evanston") to dismiss the complaint for lack of a case or controversy and/or failure to state a claim. For the reasons below, we deny plaintiffs' motion for summary judgment and grant in part defendant's motion to dismiss.

FACTS

Plaintiff Love Church is a not-for-profit corporation established in June 1985. Complaint, Affidavit of Marzell Gill at ¶ 2. Gill is Love Church's pastor. *Id.* at ¶ 3. Love

Church's congregation is comprised of approximately 30 young "working class" black men and women residing in and around Evanston.[1] *Id.* The church is not affiliated with any denomination, although it believes in traditional Christian teachings. *Id.* at ¶¶ 4, 5. Love Church's congregation meets every Sunday to practice its religion but has no permanent house of worship and instead has convened in public halls and private homes. Complaint at ¶¶ 8, 16, 17. Since April 1986, Love Church has sought to lease property on which to hold services and run a Sunday/nursery school. *Id.* at ¶ 18.

Love Church has yet to obtain a lease and has been meeting in a 900 square foot apartment of one of its congregants. *Id.*, Affidavit of Gill at ¶ 19; *see also* Plaintiff's Motion for Summary Judgment, Supplemental Affidavit of Gill at ¶ 2.[2]

Plaintiffs allege that Evanston's Zoning Ordinance ("Ordinance") has made it impossible for Love Church to obtain a suitable lease. Complaint at ¶¶ 19, 20. Churches are not permitted uses anywhere in the city of Evanston, although Evanston allows churches in any residential or business/commercial district provided they secure special use permits. *Id.* at ¶ 7; Ordinance §§ 6-5-2(b); 6-7-2-2; 6-7-3-16(B).[3] To obtain a permit, the applicant files a detailed plan for the proposed special use and pays a fee of between $370 and $480. *Id.* at ¶ 10. Evanston's Zoning Board then publishes notices concerning the proposed use and holds a hearing "within a reasonable time," approving or denying the use. *Id.* at ¶¶ 12, 13; *see also* Ordinance § 6-12-4(B). A decision is usually rendered in four to six months. *Id.* at ¶ 14. Ordinance § 6-11-13 provides for misdemeanor fines of $25 to $500 a day for each violation of the ordinance.

Plaintiffs claim that because of their limited finances they must include a contingency clause in any lease they negotiate. The clause would have the effect of voiding the lease should Evanston deny plaintiffs the special use permit. Gill states that none of the landlords he has negotiated with would agree to a contingency clause because they would have had to take their property off the market for four to six months with no certainty of leasing. *Id.*, Affidavit of Gill at ¶¶ 11, 12; *see also* Supplemental Affidavit at ¶ 1. Plaintiffs attack the constitutionality of the ordinance on various grounds: as violative of the Fourteenth Amendment's Due Process and Equal Protection Clauses, as repugnant to the First Amendment's Establishment and Free Exercise Clauses, and as a prior restraint on their freedom of expression. *Id.* at ¶¶ 23-27. Plaintiffs argue that the ordinance is unconstitutional on its face or as applied to them in this case and move for summary judgment. Evanston denies the unconstitutionality of its ordinance and challenges plaintiffs' standing to sue.

DISCUSSION

As a threshold issue, we must determine whether plaintiffs have standing to sue. Article III of the Constitution limits the power of the judiciary to the resolution of "cases" or "controversies." *Foster v. Center Township of LaPorte County*, 798 F.2d 237 (7th Cir. 1986). The concept of standing derives from the case or controversy requirement. *Id.* at 241. In order for a party to have standing to sue, the party must personally suffer actual or threatened injury as a result of defendant's putatively unconstitutional conduct; the injury must fairly be traced to the challenged action; and the injury must be one that can likely be redressed by the court's favorable decision.

Id. at 241, 242 (citing *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982)).

Evanston argues that plaintiffs have suffered no actual or threatened injury because they have neither applied for, nor have they been denied, a special use permit for any location. Defendant's Memorandum in Support of Motion to Dismiss at 5 ("Defendant's Mem."). The city has not, and intimates it will not, prosecute plaintiffs for assembling or worshiping in places other than a formal church. *Id.* at 5. Plaintiffs, on the other hand, argue that "but for" the Evanston ordinance they could have signed leases at four locations. Plaintiffs' Answer and Brief to Motion to Dismiss at 2 ("Plaintiffs' Brief"). Evanston argues that "the reluctance of property owners to lease to the plaintiffs is not the City's doing." Defendant's Mem. at 2. Indeed, plaintiffs admit that "the necessity of having a special use permit contingency clause has kept the church from obtaining a meeting place." Plaintiffs' Brief at 1, 2. Yet plaintiffs stress that their financial circumstances leave them no alternative negotiating strategy. *Id.*

We agree with Evanston that plaintiffs have no standing to sue, but only insofar as they allege a violation of due process. Plaintiffs have raised no case or controversy regarding the enforcement of the ordinance. Evanston's ordinance is presumptively valid. *Cosmopolitan National Bank v. County of Cook*, 116 Ill. App. 3d 1089, 1094, 452 N.E.2d 817, 822 (1st Dist. 1983). Plaintiffs have neither leased property nor applied for a special use permit. We presume Evanston will fairly apply the ordinance; if plaintiffs apply for a permit at an appropriate site, a permit presumably will issue. If a permit does not issue, then plaintiffs will have standing to bring a suit for violation

of due process. *See Lubavitch v. Evanston*, 112 Ill. App. 3d 223, 445 N.E.2d 343 (1st Dist. 1982) (where plaintiff, after meeting all the criteria, was arbitrarily denied a special use permit, court ordered defendant to issue the permit).

Plaintiffs do present a case or controversy, however, on their Free Exercise and Equal Protection Clause claims.[4] Evanston has no zone where churches can establish themselves without special use permits. Their injury—the inability to obtain a lease—is fairly traceable to Evanston's ordinance. No matter where plaintiffs go in Evanston, they would have to insist on a clause making the lease contingent on Evanston granting them a special use permit. Plaintiffs allege this special use procedure is unconstitutional in at least two ways. First, it burdens their ability to freely worship by hindering—indeed extinguishing—their capacity to lease property. Complaint at ¶¶ 25, 26, 30(b). Second, they argue that this ordinance distinguishes between religious and secular uses of land, permitting secular uses (such as theatres) to establish themselves without special use permits, while always requiring special use permits for religious uses. *Id.* at ¶ 26. Both the Free Exercise and the Equal Protection claims attack the validity of the requirement for a permit. Where plaintiffs challenge the constitutionality of having to go through an administrative procedure, they need not go through that procedure in order to have standing. *Entertainment Concepts, Inc. III v. Maciejewski*, 631 F.2d 497, 500 (7th Cir. 1980). Because plaintiffs' interests are directly affected by the ordinance, they have standing to attack it. *American Booksellers Association, Inc. v. Hudnut*, 771 F.2d 323, 326 (7th Cir. 1985) (citing *Buckley v. Valeo*, 424 U.S. 1, 11-12 and note 10 (1976)). We will now turn to plaintiffs' substantive claims.

First Amendment Claims

Plaintiffs claim the ordinance violates their First Amendment rights by establishing a religion, restraining their freedom of expression, and burdening their practice of religion. The First Amendment states, "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press . . . ." Two of plaintiffs' arguments show themselves to state no claim and can be disposed of with little difficulty. Regarding the Establishment Clause, regulations which reflect a clearly secular purpose do not run afoul of the clause. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971). The ordinance and the criteria for special use permits express the clearly secular purpose of protecting the health, safety, morals, and welfare. *See* Ordinance at § 6-1-2. The *Lemon* Court expressly stated "Fire inspections [and] building and zoning regulations . . . are examples of necessary and permissible [state] contacts." *Lemon* at 614. Accordingly, plaintiffs do not state a claim under the Establishment Clause.

Plaintiffs' prior restraint claim stems from the allegation that the ordinance is overbroad. Complaint at ¶ 30(d). An ordinance may be constitutionally invalid if it is written so broadly that it may inhibit—have a "chilling effect" and act as a "prior restraint"—on protected speech. *Schultz v. Frisby*, No. 85-2950, Slip Op. at 19 (7th Cir. Dec. 8, 1986) (quoting *Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 796 (1984)). We conclude that this ordinance is not overly broad because it does not restrain plaintiffs, or anyone, from worshiping. Plaintiffs have availed themselves of other meeting places for worship in Evanston (the Holiday Inn). The ordinance merely prescribes certain procedures which plaintiffs must follow

should they wish to own or lease property. Accordingly, plaintiffs do not state a claim under the prior restraint doctrine of the First Amendment.

Plaintiffs' Free Exercise claim requires more analysis. Plaintiffs argue, "Without the right to maintain a church building where a system of religious belief may be taught and where individuals may enjoy the vitality of collective worship, 'free exercise of religion' is meaningless." Plaintiffs' Brief in Support of Injunction at 4 ("Plaintiffs' Inj. Brief"). Plaintiffs do not support their argument with any analysis of the Free Exercise Clause or the cases decided under it.

Three major cases—*Braunfeld v. Brown*, 366 U.S. 599 (1961), *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972)—have shaped Free Exercise jurisprudence. What has emerged from these cases is a three-tiered analysis. As a preliminary matter, the Free Exercise Clause absolutely prohibits regulation of religious beliefs and opinions. *Braunfeld*, 366 U.S. at 603. A state may, however, regulate religious conduct. *Id.* Evanston's ordinance regulates conduct—where and how one can lease property as a church—and therefore passes the first tier of analysis. Next, the law must have a secular purpose and effect. *Id.* at 607. As we stated in regard to the Establishment Clause, the ordinance has a clearly secular purpose and its essential effect is not to suppress religious worship. So, the ordinance passes tier two. Finally, we examine the nature of the religious observance at stake, and balance it against the nature of the burden placed on the religious observance. "As a general rule, the greater the cost of practicing one's religion, the more probable that the statute creates an unconstitutional infringement . . . ." *Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood, Ohio,*

699 F.2d 303, 305 (5th Cir. 1983). Unconstitutional burdens on religious conduct occur when the government regulates practices flowing from fundamental religious beliefs. In *Wisconsin v. Yoder*, for example, an Amish person's decision to withdraw his child from public school could not be burdened with threats of criminal sanctions because withdrawal from public school flowed from a "fundamental tenet" of the Amish religion. 406 U.S. 218. *Sherbert* involved a Seventh Day Adventist's loss of unemployment benefits owing to her refusal to work on Saturdays; the Supreme Court held that refusal to work on Saturday followed "a cardinal principal of her religious faith" and therefore the state could not burden her religious practices with the loss of benefits. 374 U.S. at 306. *See also Heffron v. ISKCON*, 452 U.S. 640 (1981) (Hare Krishnas may sell and distribute religious literature); *United States v. Lee*, 455 U.S. 252 (1982) (Amish need not pay Social Security tax).

Plaintiffs argue that their effort to lease a church site flows from a fundamental tenet of their religion, and that it should therefore be insulated from the burden of regulation. But their characterization is not borne out in the case law. In *Lakewood*, the Jehovah's Witnesses had bought property in an area zoned exclusively for residential use; they had planned to construct their own place of worship on that lot. *Lakewood*, 699 F.2d at 304. The plaintiffs applied for and were denied a variance. They sued, claiming that denial of the variance burdened their right to assemble and worship. The Sixth Circuit held:

> The Congregation's 'religious observance' in the construction of a church building in a residential district .... [T]he activity has no ritualistic significance for the Jehovah's Witnesses.... The zoning ordinance does not prevent the Congregation from practicing

> its faith through worship whether the worship be in homes, schools or other churches, or meeting halls throughout the city. The ordinance prohibits the purely secular act of building anything other than a home in a residential district.

Id. at 307. *See also Grosz v. City of Miami Beach, Florida*, 721 F.2d 729 (11th Cir. 1983) in which the court held that requiring 50 congregants to cease worshiping in their rabbi's home, located in an exclusively residential district, did not burden their right to worship, as their conduct was not rooted in a religious belief but involved a secular, personal and philosophic choice.

As in *Lakewood* and *Grosz*, plaintiffs wish to worship on property free from Evanston's regulation. Plaintiffs' freedom to worship is at best tangentially related to worshiping in their own building. While convenient and desirable, leasing property is not a fundamental tenet or cardinal principal of the religion—in contrast to the situations in *Sherbert* and *Yoder*. The ordinance does not prevent plaintiffs from practicing their faith through worship in homes or other churches or meeting halls.

The burden this ordinance places on Love Church is merely financial.[6] If the price is right, landlords can be found who will be willing to agree to a contingency clause. If all else failed, plaintiffs could rent without a contingency clause. Economic burdens do not rise to a constitutionally impermissible infringement of freedom to worship. *Braunfeld*, 366 U.S. at 605. In *Braunfeld*, Sunday closing laws did not unconstitutionally burden the religious rights of observant Jews who closed their businesses on Saturday and wanted to open on Sunday. It merely made the practice of their religion more costly. *Id.* Evanston's ordinance has the same effect here. Evanston does not put plaintiffs in the situation where exercising their religious be-

liefs would result in criminal penalties or loss of government benefits. While plaintiffs could face penalties if they assembled as a church without a permit, the penalties have a secular purpose and effect and do not impinge on plaintiffs' free exercise of religion. *See Lakewood*, 699 F.2d at 307.

Plaintiffs would distinguish *Lakewood* by the fact that churches were permitted uses at least somewhere in Lakewood, whereas in Evanston churches require special use permits in all zones; Evanston's ordinance therefore has the purpose and effect of eliminating from Evanston all exercise of a First Amendment right. Plaintiffs' Brief at 9-11. We do not agree. Evanston has at least 70 churches. Defendant's Mem. at 4. There were, and presumably there are, religious users for whom the cost of obtaining a special use permit will not be prohibitive. Moreover, nothing in the record indicates that plaintiffs could not lease, or sublease, an existing church or worship in a meeting hall. These alternatives may be less appealing or more costly. But the Constitution does not require Evanston to subsidize the real estate market for First Amendment users. *City of Renton v. Playtiume Theatres*, ____ U.S. ____, 106 S. Ct. 925 (1986). The sweep of Evanston's ordinance is irrelevant for the purposes of Free Exercise Clause analysis. Despite the financial imposition on plaintiffs, we hold that their freedom of religion, as protected by the Free Exercise Clause, has not been infringed.

Equal Protection Clause

Although plaintiffs do not clearly articulate an Equal Protection argument, we believe this is the crux of their challenge to Evanston's Zoning Ordinance.[7] Plaintiffs argue that Evanston gives "non-religious assembly uses

preferences over substantially identical religious uses." Plaintiffs' Brief at 11. The Equal Protection Clause mandates that "all persons similarly situated be treated alike." *City of Cleburne v. Cleburne Living Center,* ____ U.S. ____, 105 S. Ct. 3249, 3254 (1985). Plaintiffs note that all commercial districts (C1, C2, C3) permit hotels and meeting halls; Districts C2 and C3 permit auction rooms and funeral parlors. Plaintiffs' Inj. Brief at 7. But churches must obtain a special use permit in order to locate in these zones. *Id.* In all business districts, hotels, meeting halls, and music schools are permitted; theatres are permitted uses in almost all of these zones. Churches need special use permits. And in a manufacturing zone (M3), where auditoriums and arenas can locate, churches are prohibited. *Id.* In other words, plaintiffs argue that Evanston, in its zoning ordinance, has segregated religious land uses from other commercial or business land uses and subjected religious uses to treatment unlike that of secular uses.

Defendant's argument that churches may be subject to reasonable regulation and that special use permits have been continually upheld as a method of reasonable regulation is unresponsive. It addresses the issue of whether churches can be regulated at all. That is a different point. Furthermore, Evanston bases its argument on cases where churches were permitted uses somewhere in the municipality and the churches sought to locate in residential districts. See Defendant's Mem. at 8-12; *South Side Move of God Church v. Zoning Board of Appeals,* 47 Ill. App. 3d 723, 365 N.E.2d 118 (1977); *Coston Chapel A.M.E. Church v. Chaddick,* 9 Ill. App. 3d 321, 292 N.E. 2d 215 (1972); *St. James Temple of the A.O.H. Church of God, Inc. v. Board of Appeals,* 100 Ill. App. 2d 301, 241 N.E.2d 525 (1968); *Minney v. City of Azusa,* 164 Cal.

App. 2d 12, 330 P.2d 255 (1959); *Corporation of Presiding Bishop C.J.L.D.S. v. Porterville*, 90 Cal. App. 2d 656, 204 P.2d 823, *aff'd*, 338 U.S. 850 (1949). The general thrust of these cases was that churches affected the character of a residential neighborhood—by increasing traffic, making parking more difficult, and so forth—and that permitting churches only as special uses was rationally related to the municipality's exercise of its police power. Plaintiffs do not challenge Evanston's authority to regulate residential districts by means of a special use permit. Rather, they challenge the ordinance's rationality as it relates to business and commercial districts.

Because of the posture of this case,[8] defendant has not offered any justification for the ordinance. One possibility, we suppose, is "conserving the taxable value of land and buildings throughout the city." Ordinance § 6-1-2(c). Whether or not this is Evanston's rationale, we must determine the appropriate level of scrutiny to give the religious use provision in the ordinance. If this classification is on the basis of religion, then scrutiny is strict:

> Where the legislative classification works to the disadvantage of a constitutionally suspect class—based for example, on race, nationality, alienage or religious affiliation—then courts may uphold the classification only if it is 'precisely tailored to serve a compelling governmental interest.'

Sklar v. Byrne, 727 F.2d 633, 638 (7th Cir. 1984) (quoting *Plyler v. Doe*, 457 U.S. 202, 216-17 & n.14 (1982)). A compelling governmental interest must be supported with careful studies and detailed legislative findings. *City of Renton v. Playtime Theatres, Inc.*, ____ U.S. ____, 106 S. Ct. 925 (1986). It would appear that Evanston bears a heavy burden here. *See Southern Burlington County NAACP v. Township of Mt. Laurel*, 67 N.J. 151, 336 A.2d 713, *appeal denied and cert. denied*, 423 U.S. 808 (1975)

(preserving municipality's tax base was an illegitimate rationale for a zoning ordinance); *Jewish Reconstruction Synagogue v. Incorporated Village of Roslyn Harbor*, 383 N.Y.2d 283, 342 N.E.2d 534 (1975), *cert. denied*, 426 U.S. 950 (1976) (a religious institution's effect on the town's tax base outweighed by constitutional considerations). Evanston must also show that the special use permit procedure is the least restrictive way of serving its interest. If the classification is not on the basis of religion, the ordinance must still be rationally related to a government interest. *See Euclid v. Amber Realty Co.*, 272 U.S. 365 (1926).

Evanston should now respond to plaintiffs' summary judgment motion based on denial of equal protection.

CONCLUSION

We grant in part the defendant's motion to dismiss the complaint for failure to state a claim. The Equal Protection claim remains. We direct defendant to respond to plaintiffs' motion for summary judgment by April 10, 1987. Plaintiffs may reply by April 24, 1987. Plaintiffs' motion for summary judgment is denied. Plaintiff Gill is dismissed from the case for want of standing.

DATED: MAR 20, 1987

ENTER: /s/ JOHN F. GRADY
United States District Judge

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[1] Gill states the congregation now consists of 11 members because the church lacks proper facilities; at one time 250 people attended Love Church's services. Supplemental Affidavit of Gill at ¶¶ 2, 3.

[2] Plaintiffs now convene at a Holiday Inn in Skokie, Illinois. Supplemental Affidavit of Gill at ¶ 7.

[3] Churches are not singled out for this procedure; art galleries, libraries, museums, and various other uses must also obtain special use permits under the ordinance.

[4] We question whether Pastor Gill has any interest beyond that of Love Church, that would give him standing to sue regarding the remaining claims of free exercise and equal protection. Nothing in the complaint indicates that he suffers an injury distinct from the injury suffered by Love Church. His injury *derives* from the fact that the ordinance requires *churches* to get special use permits. Accordingly, we dismiss him as a party for want of standing. If Love Church has a different view of the matter, it may submit a brief on this point and we will reconsider our decision. We will continue to refer to the "plaintiffs" for the sake of continuity.

[5] The Free Exercise Clause of the First Amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." It applies to state and local governments through the Fourteenth Amendment's Due Process Clause. *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

[6] Plaintiffs have supplied no information regarding the rents that have been demanded of them with or without a contingency clause. They simply argue that no one will rent to them if they insist on such a clause. *See infra* at 3.

[7] The Equal Protection Clause of the Fourteenth Amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." Corporations are "persons" for the purpose of the Equal Protection Clause. *Metropolitan Life Insurance Company v. Ward*, ____ U.S. ____, 105 S. Ct. 1676 (1985).

[8] Defendant moved to dismiss the complaint; plaintiffs responded to the motion with their own motion for summary judgment. Defendant did not reply to that motion.

APPENDIX B-2

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case Number: 86 C 09850 Date: September 3, 1987

Name of Assigned Judge: JOHN F. GRADY

Case Title: Love v Evanston

* * * * *

DOCKET ENTRY:

(1) ☐ Judgment is entered as follows:

(2) ☒ [Other docket entry:]

Enter Memorandum Opinion. Plaintiff's motion for summary judgment is granted and we declare the special use permit requirement of Evanston's zoning ordinance §§ 6-7-2-2, 6-7-3-2, as it applies to churches, to be violative of the Equal Protection Clause in that it discriminates on the basis of religion. The case is set for a status conference on September 24, 1987, at 10:30 a.m.

* * * * *

(12) [For further detail see order attached to the original minute order form.]

* * * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 86 C 9850

LOVE CHURCH, an Illinois not-for-profit corporation,

Plaintiff,

v.

CITY OF EVANSTON, an Illinois municipal corporation,

Defendant.

MEMORANDUM OPINION

This case is before us on the motion of plaintiff Love Church, Inc. ("Love Church" or "plaintiff") for summary judgment on the ground that defendant City of Evanston's ("Evanston") zoning ordinance violates the Equal Protection Clause of the Fourteenth Amendment. For the reasons below, plaintiff's motion is granted.

FACTS

We set forth the facts of this case in our previous memorandum opinion and reprint them here for convenience's sake:

> Plaintiff Love Church is a not-for-profit corporation established in June 1985. Complaint, Affidavit of Marzell Gill at ¶ 2. Gill is Love Church's pastor. *Id.* at ¶ 3. Love Church's congregation is comprised of approximately 30 young "working class" black men and women residing in and around Evanston.[1] *Id.* The church is not affiliated with any denomination, al-

though it believes in traditional Christian teachings. *Id.* at ¶¶ 4, 5. Love Church's congregation meets every Sunday to practice its religion but has no permanent house of worship and instead has convened in public halls and private homes. Complaint at ¶¶ 8, 16, 17. Since April 1986, Love Church has sought to lease property on which to hold services and run a Sunday/nursery school. *Id.* at ¶ 18.

Love Church has yet to obtain a lease and has been meeting in a 900 square foot apartment of one of its congregants. *Id.*, Affidavit of Gill at ¶ 2.[2]

Plaintiffs allege that Evanston's Zoning Ordinance ("Ordinance") has made it impossible for Love Church to obtain a suitable lease. Complaint at ¶¶ 19, 20. Churches are not permitted uses anywhere in the city of Evanston, although Evanston allows churches in any residential or business/commercial district provided they secure special use permits. *Id.* at ¶ 7; Ordinance §§ 6-5-2(b); 6-7-2-2; 6-7-3-16(B).[3] To obtain a permit, the applicant files a detailed plan for the proposed special use and pays a fee of between $370 and $480. *Id.* at ¶ 10. Evanston's Zoning Board then publishes notices concerning the proposed use and holds a hearing "within a reasonable time," approving or denying the use. *Id.* at ¶¶ 12, 13; *see also* Ordinance § 6-12-4(B). A decision is usually rendered in four to six months. *Id.* at ¶ 14. Ordinance § 6-11-13 provides for misdemeanor fines of $25 to $500 a day for each violation of the ordinance.

Plaintiffs claim that because of their limited finances they must include a contingency clause in any lease they negotiate. The clause would have the effect of voiding the lease should Evanston deny plaintiffs the special use permit. Gill states that none of the landlords he has negotiated with would agree to a contingency clause because they would have had to take their property off the market for four to six months with no certainty of leasing. *Id.*, Affidavit of Gill at ¶¶ 11, 12; *see also* Supplemental Affidavit at ¶ 1.

Love Church v. City of Evanston, No. 86 C 9850, Memorandum Op. at 1-3 (N.D. Ill. March 20, 1987) ("March Memorandum"). In the March Memorandum, we narrowed plaintiff's challenge of the ordinance to one of equal protection. We noted that churches are not permitted as a matter of right anywhere in Evanston but must obtain a special use permit in order to lease, own, and operate property as a church. *Id.* at 11. Meeting halls, theatres, schools, funeral parlors, community centers, and not-for-profit recreational buildings, however, are permitted as of right in some of Evanston's districts. *Id.* From the face of the ordinance, we concluded that Evanston gave secular assembly users preference over substantially similar religious assembly users in possible violation of the Equal Protection Clause. *Id.* at 12-13. We asked the parties to brief the issue, paying particular attention to the basis of the ordinance's classification and the appropriate level of scrutiny. *Id.*

DISCUSSION

The Equal Protection Clause of the Fourteenth Amendment mandates that no state shall "deny to any person within its jurisdiction the equal protection of the laws" and is "essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439 (1985) (quoting *Plyer v. Doe*, 457 U.S. 202, 216 (1982)). Unequal treatment among similarly situated individuals, no matter how subtle, is anathema under the Equal Protection Clause. *Cf. Virginia Board of Elections v. Hamm*, 230 F. Supp. 156, *aff'd* 379 U.S. 19 (1964) (law requiring separate lists of blacks and whites in voting, property, and tax records invalid). The standards for determining the validity of state legislation, such as a zoning ordinance, under the Equal Protection Clause are well established:

> Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classifications challenged be rationally related to a legitimate state interest.

New Orleans v. Duke, 427 U.S. 297, 303 (1976). But where the legislative classification disadvantages a constitutionally suspect class, the "courts may uphold the classification only if it is 'precisely tailored to serve a compelling governmental interest.' " *Sklar v. Byrne*, 727 F.2d 633, 636 (7th Cir. 1984) (quoting *Plyler v. Doe*, 457 U.S. 216-17 & n.14).

Therefore, in order to apply the proper standard of review, we must determine the basis of the ordinance's classification. Evanston contends that "[t]he City is clearly not basing its classification on the basis of religion [but] purely on land use aspects." Defendant Memorandum in Opposition at 1 ("Def. Mem."). The uses which find themselves in the same category as churches, that is, excluded from all districts except upon obtaining a special use permit, are "nursing homes, child care institutions, retirement homes, shelter care homes, hospitals, airports, amusement establishments, cemeteries, food cooperatives in churches, not-for-profit recreational buildings, community centers, private clubs and lodges, golf courses, truck gardening, nurseries and greenhouses, shelters for the temporary homeless, group care homes, institutions for the aged, retirement hotels, and [fast food] restaurants." *Id.* at 2. Thus, Evanston concludes, the classification is not on the basis of religion but on the basis of the "special effect" these uses have upon their neighborhoods. *Id.* In other words, Evanston argues that because some secular land uses as well as religious land uses are classified

in the same way, the classification is not based on religion but on legitimate municipal interest. To paraphrase Justice Marshall, when legislation burdens members of a class entitled to protection under the Fourteenth Amendment, the fact that the legislation also burdens members of unprotected classes is irrelevant. *Palmer v. Thompson*, 403 U.S. 217, 272 (1971) (Marshall, J., dissenting). So when Evanston excludes churches from all its municipal zoning districts in the absence of special use permits, the fact that other land users must also obtain special use permits does not resolve the question of the basis of the ordinance's classification.

Rather than focus on what other land uses Evanston has chosen to conditionally exclude, we must look to how Evanston treats land uses "similarly situated" to churches. *See Cleburne*, 473 U.S. at 448 (in denying a special use permit, city violated Equal Protection Clause by disparately treating similar land uses). If all land uses similarly situated to churches must obtain special use permits, then Evanston's argument that the classification is not based on religion may have some merit.

The ordinance does not define the term "churches" but Webster's Ninth New Collegiate Dictionary gives the following definition: "a building for public and especially Christian worship." Interestingly, Evanston states that "[c]hurches now serve as community centers, schools, occasionally shelters for the homeless, food distribution centers and other social functions in addition to the traditional function of religious services and instruction." Def. Mem. at 12. We note that contrary to Evanston's reading of its ordinance, community centers (and not-for-profit recreation buildings) are permitted in residential zones 6 and 7. Schools are also permitted in those zones. It appears, then, that Evanston, by its own admission, treats

churches differently than these uses because of "occasional other social functions" churches perform in addition to their traditional ones. As for traditional church use, clearly a land use similar to that is a meeting hall. At meeting halls, people assemble on a regular basis to attend speeches, lectures, or other ceremonies. At meeting halls, people socialize. Meeting halls are permitted uses in all business and commercial districts. Theatres, for zoning purposes, are not unlike churches, in that large groups of people of all ages assemble to participate in a common experience. Theatres are permitted uses in all commercial and most business zones. Funeral parlors are permitted uses in some business and commercial zones. Schools, as mentioned before, are permitted in two residential zones and certain types of schools are allowed in business and commercial zones.

More striking are the differences between churches and the other uses which must obtain special use permits. Airports, cemeteries, golf courses, green houses, nurseries, truck gardening, and hospitals are all land-intensive and sometimes noise-intensive uses which do not compare to a church use. Likewise, fast food restaurants and amusement establishments often keep round-the-clock hours and cater to needs altogether different from a church. Nursing homes, retirement homes, shelter care homes, group care homes, institutions for the aged, and retirement hotels are also residential uses generally incomparable to a church. Private clubs and lodges do appear to be uses similar to a church. However, this fact is not enough to establish that Evanston has not classified on the basis of religion. Other assembly uses are not subjected to the same treatment as churches. If meeting halls as well as theatres had to get special use permits, then Evanston could assert that it zoned on the basis of something other than religion.[4]

Evanston's claim that it has zoned purely on land use aspects and not on the basis of religion is not supported by the facts. Evanston argues further that because we previously ruled that the ordinance neither established religion nor impinged on its free exercise, the ordinance could not be based on a religious classification. Def. Mem. at 3-4. Defendant's conclusion is hasty. Suppose, for example, a group of people wished to assemble on a regular basis in Evanston to discuss and hear lectures on classical literature. This group might also wish to have seminars for young people after school or on weekends to expose them to "great books." These people could rent a building in any business or commercial zone and have their meetings. But if that same group of people wished to assemble for the purpose of religious worship and to hold classes for its young people to educate them about religion, they would have to get special permission from Evanston. The only distinguishable feature of the groups in our hypothetical is the purpose and content of the assembly. Because Evanston's ordinance distinguishes between religious assembly uses and non-religious assembly uses, it classifies on the basis of religion.

Having concluded that the ordinance classifies on the basis of religion, we will uphold it only if it is narrowly tailored to serve a compelling governmental interest. Evanston suggests "there are many bases for classifying churches separate and apart from hotels, meeting halls, theatres, auction rooms and funeral parlors." Def. Mem. at 11. We glean from Evanston's brief four reasons. One distinction Evanston suggests is that churches are non-commercial entities while business uses are obviously commercial. Since a church is a "community use," Evanston argues that it "could well conclude that it would be totally inappropriate to permit . . . a church to be located in a business and commercial district without the necessary

examination and conditional approval that a special use permit allows." *Id.* at 13. That a church needs the city's permission to operate because it is not a commercial enterprise, while a funeral parlor, because it charges for its services, does not, is unprincipled. The absence of commercial exchange in the case of a church does not threaten any compelling interest of Evanston. Evanston might intend to argue that segregating noncommercial uses from commercial uses is a fundamental zoning interest, since it cites *People v. Morton Grove*, 16 Ill. 2d 183, 157 N.E. 2d 33 (1959). *Morton Grove* was a challenge to a municipality's authority to prohibit residential uses from intruding into commercial and industrial zones. It was a fundamental attack on the concept of Euclidian zoning. Plaintiffs here do not suggest that Evanston may not exclude residential uses from commercial or industrial zones. Rather, they complain that their assembly use is treated differently than other assembly uses. In this context, we find the noncommercial/commercial distinction irrelevant. Evanston has not offered any reason why a church's noncommercial nature requires it to obtain special approval.

Evanston argues next that the "traffic generated by a church both with respect to volume and time may be substantially different than that generated by a hotel, meeting hall, funeral parlor or an auction room." Def. Mem. at 13. While traffic concerns are legitimate, we could hardly call them compelling. In any event, Evanston does not indicate how a church poses a greater traffic problem than, say, a funeral parlor. As plaintiffs point out, funeral parlor and church traffic depend on the vagaries of who died and who is preaching. Plaintiff Reply at 8. A sufficiently narrow way of protecting the city's interest is through parking and seating capacity regulations. Evanston requires all commercial and business uses to comply

with these regulations in order to control traffic congestion caused by the uses. Evanston proffers no reason why churches could not be similarly regulated.

A closely related concern of Evanston's is the "introduction of large numbers of people travelling on foot." Def. Mem. at 12. While pedestrian safety is certainly a legitimate, even compelling interest, all business, commercial, and residential uses attract pedestrians. Many people walk to a theatre or a meeting hall. If pedestrians do not threaten the city's interest while walking to attend a show or a meeting, why should it be different when they are walking to attend a religious service? The answer is it should not. The ordinance is not narrowly drawn to serve the interest of pedestrian safety.

Lastly, Evanston argues that the presence of young children "may be totally out of character in certain commercial as well as residential areas." *Id.* at 12. We find the phrase "totally out of character" to be laden with ambiguity. If by "totally out of character," Evanston relates to the health and safety of children, then Evanston's concern may be valid. However, to require churches to obtain special use permits because children may be present is overbroad. Evanston has permitted schools, not-for-profit recreation buildings, and community centers—uses which attract large numbers of children—to operate without special use permits. Furthermore, children attend theatres, go shopping and play in parks, uses that are found in virtually every district in Evanston. Evanston has not required these uses to get special permission. Again, Evanston has offered no reason why the presence of children associated with church use presents any greater threat than the presence of children associated with any other permitted use.

Evanston argues that it may exclude any land use from the entire municipality, provided the exclusion bears a substantial relationship to the preservation of public health, safety, morals or general welfare. Def. Mem. at 10. For this position, Evanston relies on two Illinois cases, *High Meadows Park, Inc. v. City of Aurora*, 112 Ill. App. 2d 220, 250 N.E.2d 517 (2d Dist. 1969) and *Village of Bourbonnais v. Herbert*, 86 Ill. App. 2d 367, 229 N.E.2d 547 (3d Dist. 1967). These cases are distinguishable on their facts and are even contrary to defendant's position.[5] *High Meadows Park* concerned an ordinance which banned trailers; *Village of Bourbonnais* involved an ordinance which conditionally excluded fire stations. Neither of those ordinances concerned the exclusion of a use protected under the constitution. In *Village of Bourbonnais*, the court did note that "municipalities . . . are not required to set aside portions of territory within their boundaries to accommodate every land use, if some uses are wholly inconsistent with the existing and developing character of the municipality." 229 N.E.2d at 577. As a general statement, we do not disagree. But Evanston does not argue, nor could it, that churches are wholly incompatible with *every* district in Evanston. Furthermore, the court went on to say it disapproved of conditional exclusion when land uses could be accommodated within ordinary zoning classifications. *Id.* While arguing that churches are too mercurial to be accommodated by ordinary zoning techniques, Evanston has been able to accommodate similarly situated assembly uses without much ado. Evanston cites *High Meadows Park* for the proposition that "there would appear to be no constitutional limitation on a municipality's power to exclude uses from a particular district . . . ." 250 N.E.2d at 522. As quoted, not only is this proposition incomplete, it is wrong. *See City of Cleburne*, 473 U.S. at 447-50 (under the Equal Protection Clause,

a district which accommodates multiple dwellings cannot exclude a group home for the mentally retarded). The court in *Bourbonnais* continued that "it would seem equally apparent [that zoning] must be exercised in a nondiscriminatory manner and based upon the reasonable exercise of police power . . . ." *Id.* This is the pith of plaintiff's case—that Evanston's ordinance is discriminatory, that it treats similarly situated uses unequally and unreasonably.

Evanston maintains we must apply to its ordinance the more deferential test of rational relationship. After considering Evanston's argument, we are convinced that the ordinance cannot pass even that test. In light of *Cleburne*, unless Evanston can articulate a reason why a church use would threaten legitimate interests of the city in a way that other similarly situated permitted uses would not, then the ordinance is invalid. 473 U.S. at 448. Again, the interests Evanston says are rationally related to the ordinance are traffic congestion, pedestrian safety, and child safety. Evanston has provided no evidence that churches pose any greater threats to those interests than do the similarly situated permitted uses of meeting halls, theatres, and schools.

In sum, although Evanston has articulated some interests that we can characterize as legitimate, sometimes compelling, in every instance we find the legislative response to be overinclusive. Not only do we find the ordinance much broader than necessary to serve any compelling interest, it is not even rationally related to a legitimate interest. Evanston has failed to demonstrate the existence of any genuine issue of material fact. We therefore grant plaintiff's motion for summary judgment and hold that the special use permit requirement of Evanston's zoning ordinance, as it relates to churches, is invalid in that it violates the Equal Protection Clause.[6]

Neither party has briefed the issue of relief. Love Church in its complaint has prayed for declaratory, injunctive and monetary relief, including attorney's fees and costs under 42 U.S.C. § 1988. Since the basis of our holding is that the ordinance unreasonably discriminates between similarly situated uses, we think the proper remedy may be to require Evanston to permit churches wherever similarly situated uses are permitted, that is, in all business and commercial districts.[7] However, we want the benefit of the parties' views and would prefer that they structure the specifics of relief. Accordingly, we set this case for a status conference on September 24, 1987, at 10:30 a.m. The parties should come prepared to discuss the appropriate injunctive and monetary relief.

CONCLUSION

We grant plaintiff's motion for summary judgment and declare the special use permit requirement of Evanston's zoning ordinance §§ 6-7-2-2, 6-7-3-2, as it applies to churches, to be violative of the Equal Protection Clause in that it discriminates on the basis of religion. The case is set for a status conference on September 24, 1987, at 10:30 a.m.

DATED: SEP 3, 1987

ENTER: /s/ JOHN F. GRADY
United States District Judge

[1] Gill states the congregation now consists of 11 members because the church lacks proper facilities; at one time 250 people attended Love Church's services. Supplemental Affidavit of Gill at ¶¶ 2, 3.

[2] Plaintiffs now convene at a Holiday Inn in Skokie, Illinois. Supplemental Affidavit of Gill at ¶ 7.

[3] Churches are not singled out for this procedure; nursing homes, retirement homes, shelter care homes, shelters for the homeless, group care homes, institutions for the aged, retirement hotels, child care institutions, airports, private clubs, golf courses, truck gardening, nurseries and greenhouses and fast-food restaurants are not permitted uses anywhere in Evanston and must also obtain a special use permit in order to operate. *See* Ordinance §§ 6-5-1-6-8-5.

[4] While such an ordinance would not be violative of the Equal Protection Clause, it might run afoul at the Free Speech Clause. *See supra* note 5.

[5] There are cases which have held a municipality may not exclude churches from every district within its boundary. *Mooney v. Village of Orchard Lake*, 333 Mich. 389, 53 N.W.2d 308 (1952); *North Shore Unitarian Soc. v. Village of Plandome*, 200 Misc. 524, 109 N.Y.S. 803 (1951). Both of these cases held that such an exclusion was an unreasonable exercise of police power. Additionally, the Supreme Court has suggested that a municipality may not totally exclude a land use that the First Amendment protects. *See City of Renton v. Playtime Theatres, Inc.*, ____ U.S. ____, 106 S. Ct. 925 (1986) (total ban on adult theatres may not be constitutional); *Schad v. Borough of Mount Ephriam*, 452 U.S. 61 (1981) (municipality may not ban "live entertainment" from its boundaries); *Young v. American Mini Theatres*, 427 U.S. 50 (1976) (total ban on adult theatres may not be constitutional).

[6] Evanston claims that the ordinance cannot be struck down under the Fourteenth Amendment unless plaintiff proves Evanston had discriminatory intent. Def. Mem. at

4. Evanston is wrong. When a statute on its face discriminates on the basis of race, national origin, religion or fundamental rights, discriminatory intent need not be shown. *Strauder v. West Virginia*, 100 U.S. 303 (1880). Only when a law is facially neutral must any discrimination be proven purposeful. *Arlington Heights v. Metropolitan Housing Corporation*, 429 U.S. 252 (1977). Evanston's ordinance on its face discriminates on the basis of religion and therefore there is no need to prove discriminatory intent.

[7] We do not decide, nor should anything in this opinion be construed to suggest, that churches which house the temporarily homeless or have food cooperatives may not be subject to the special use technique. This issue is not before us.

APPENDIX B-3

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

LOVE CHURCH,	)	
	)	
Plaintiff,	)	
v.	)	No. 86 C 9850
	)	
CITY OF EVANSTON,	)	
	)	
Defendant.	)	CHIEF JUDGE GRADY

ORDER

This matter coming before the court pursuant to this Court's order of February 16, 1988, and the court being fully advised in the premises, the Court finds as follows:

(1) Plaintiff, Love Church, has entered into a lease agreement to occupy the second floor of the building known as 823 Davis Street, Evanston, for the purpose of holding religious worship services, and said property is adjacent to a large public parking lot;

(2) 823 Davis Street is located in a B-5 (Business) zone and Evanston allows under the Evanston Zoning Ordinance, theaters, restaurants, meeting halls, and certain schools as permitted uses in all business and commercial districts; and

(3) On September 3, 1987 this Court declared invalid "the special use permit requirement of Evanston's zoning

ordinance §§6-7-2-2 and 6-7-3-2 as it applies to churches [as] violative of the Equal Protection Clause in that it discriminates on the basis of religion".

THEREFORE, IT IS HEREBY ORDERED:

(1) That the Defendant, City of Evanston, is hereby permanently enjoined from requiring Plaintiff, Love Church, to obtain a special use permit pursuant to the Evanston Zoning Ordinance to operate a church in the building commonly known as 823 Davis Street, Evanston, IL;

(2) This Court shall retain jurisdiction of this case for the purpose of enforcing this order and for the purpose of reviewing any subsequent locations of Love Church.

DATE: MAR. 14, 1988 ENTER: /s/ JOHN F. GRADY
Chief Judge Grady

Mauck & Baker
7 South Dearborn Street
Suite 1207
Chicago, IL 60603
(312) 782-8188

APPENDIX B-4

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case Number: 86 C 09850 Date: AUG 22, 1988

Name of Assigned Judge: JOHN F. GRADY

Case Title: Love v. Evanston

* * * * *

DOCKET ENTRY:

(1) ☒ Judgment is entered as follows:

(2) ☐ [Other docket entry:]

ENTER FINAL JUDGMENT ORDER. Judgment entered in favor of plaintiff, Love Church, and against defendant, City of Evanston, in the amount of $17,782.89.

* * * * *

(12) [For further detail see order attached to the original minute order form.]

* * * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LOVE CHURCH, an Illinois not-for-profit corporation, Plaintiff,	)	
v.	)	No. 86 C 9850
CITY OF EVANSTON, an Illinois municipal corporation, Defendant.	)	

FINAL JUDGMENT ORDER

The court having entered a permanent injunction in favor of plaintiff in this cause on March 15, 1988, and having reserved the question of damages,

And the court having heard evidence on the damage issue, and being fully advised in the premises,

JUDGMENT IS HEREBY ENTERED in favor of the plaintiff, LOVE CHURCH, an Illinois not-for-profit corporation, and against the CITY OF EVANSTON, an Illinois municipal corporation, defendant, in the amount of $17,782.89.

DATED: AUG 22, 1988

ENTER: /s/ JOHN F. GRADY
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case Number: 86 C 09850 Date: AUG 22, 1988

Name of Assigned Judge: JOHN F. GRADY

Case Title: Love v. Evanston

* * * * *

DOCKET ENTRY:

(1) ☐ Judgment is entered as follows:

(2) ☒ [Other docket entry:]

ENTER MEMORANDUM OPINION. Plaintiff awarded damages for compensation for lost contributions, for value of music services and for disruption and inconvenience.

* * * * *

(12) [For further detail see order attached to the original minute order form.]

* * * * *

August 22, 1988

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LOVE CHURCH, an Illinois not-for-profit corporation, Plaintiff,	)	
v.	)	No. 86 C 9850
CITY OF EVANSTON, an Illinois municipal corporation, Defendant.	)	

MEMORANDUM OPINION

On March 15, 1988, this court entered a permanent injunction, prohibiting the City of Evanston from requiring the plaintiff, Love Church, to obtain a special use permit under the Evanston zoning ordinance to operate a church in the building located at 823 Davis Street, Evanston. Following the entry of the injunction, the court held additional hearings on the issue of damages. Plaintiff filed its damage summary on May 12, 1988, setting forth in detail the various damages it claims to have sustained as a result of defendant's conduct. The court has reviewed the evidence and is now ready to rule.

The ascertainment of damages in this case is not easy. More than the usual degree of speculation is involved. Defendant takes the position that the plaintiff has shown no damages at all that were proximately caused by any

act or omission of the defendant, but that assertion goes too far. The evidence clearly establishes that, as a result of defendant's special use permit requirement, plaintiff was denied the opportunity to conduct its church activities at a suitable location in Evanston, and that this deprivation continued for a considerable period of time. Plaintiff's resort to inadequate facilities during this period was, in turn, the cause of a drop in attendance and a consequent loss of contributions. These lost contributions, in money and services, are difficult to measure, but the task is not impossible. What is impossible is any kind of exactitude, but the law does not require that. Reasonable estimates are a sufficient basis for a damage award, *Schatz v. Abbott Laboratories, Inc.*, 51 Ill.2d 143, 281 N.E.2d 323, 325-26 (1972), and the court believes the evidence in this case affords a basis for reasonable estimates. On the other hand, some of the items claimed by plaintiff are not supported by the evidence, and no damages will be awarded for these items.

Plaintiff's damage summary provides a good format for discussion, and the various damage items will be discussed in the order listed there.

I. LOST INCOME

Plaintiff's Exhibit 5 is a list of the monthly contributions made by plaintiff's parishioners for the calendar year 1986. Plaintiff asks for damages equal to the monthly contributions certain parishioners stopped making when the church had to move to inadequate quarters in March 1986. The argument is that, had plaintiff been able to hold its services in a suitable Evanston facility, these parishioners would have continued their membership in the church and would have continued to contribute as much as they had been contributing before March 1986.

Defendant argues that there is no evidence as to why these people stopped attending the church or reduced their contributions, and that therefore plaintiff has failed to establish that the loss of income has anything to do with the Evanston zoning ordinance. Defendant further contends that there is no way to determine how much these individuals would have contributed if they had continued their attendance at a suitable church facility.

Assuming plaintiff is entitled to lost contributions for some period of time, the parties disagree as to how long that time should be. Plaintiff seeks damages through the month of February 1988 (after which it moved into its present quarters at 823 Davis Street), whereas defendant argues that damages should be cut off as of September 3, 1987, the date we granted summary judgment declaring the ordinance invalid.

The court finds that there is both direct and circumstantial evidence from which it is reasonable to conclude that certain parishioners stopped attending Love Church because of the inadequate facilities the church occupied between March 1986, when it left the Evanston Holiday Inn, and November 1986 when it finally secured adequate quarters at the Skokie Holiday Inn. Witnesses testified to the cramped, unsanitary and otherwise inappropriate accommodations during that period and described the adverse reaction on the part of many members of the congregation. No other reason has been offered for the drop in attendance.

On the question of whether the various parishioners would have continued making contributions at their pre-April 1986 level, an inference is justified in some instances but not in others, as the analysis below will show.

The court believes that with reasonable diligence the plaintiff should have been able to rent suitable accommodations in Evanston within four months after the court's Memorandum Opinion of September 4, 1987, or by December 31, 1987. Plaintiff was dilatory in its efforts to rent a specific site, and this was no fault of the defendant. Damages for lost income will therefore be cut off as of December 31, 1987.

We will now turn to a discussion of the specific contributions plaintiff claims to have lost.

Brenda Bell. This parishioner contributed $70.00 in January 1986, $25.00 in February, and $57.50 in March, for a total of $152.50 and an average of $50.83. When the church moved to Ridgeville Park District at the end of March, Brenda Bell continued to contribute. She gave $30.00 in April, $25.00 in May, and $100.50 in June. Clearly, the undesirable conditions at Ridgeville had not yet affected her contributions. However, in July she gave only $15.00, $28.00 in August, $11.00 in September and $15.00 in October. She then stopped attending Love Church.

From these facts, the court finds that, had plaintiff been able to meet in an adequate Evanston facility, Brenda Bell would have continued contributing an average of $50.00 per month through December 1987. Plaintiff sustained no damages as to Brenda Bell until July 1986, when her contributions began clearly to fall below her pre-April 1986 average. Plaintiff is awarded damages of $50.00 per month for 18 months (July 1986 through December 1987), less a $69.00 credit for the contributions Brenda Bell made in the months of July through October 1986, for a net award of $831.00

The Conyers Family. This family made contributions for only two months prior to the move from the Evanston Holiday Inn—$5.00 in February and $70.75 in March. Their record after the move was inconsistent, e.g., $3.00 in May, $3.00 in June, but $65.00 in July. This evidence is insufficient to enable the court to conclude that, had the church been housed in a suitable facility, the Conyers family would have continued to contribute at any particular level. Accordingly, no damages are awarded for lost contributions from the Conyers family

The Smith Family. Plaintiff's damages summary lumps the members of this family together, but valid analysis requires that they be considered separately.

Yvonne Smith. She gave $6.00 in January and $8.00 in February. The only other contribution was $10.00 in July. The pattern is insufficient to warrant any inference, and no damages are awarded.

Mr. and Mrs. A. Jeigula. This couple gave $15.00 in January, $34.00 in February, and $55.00 in March, for an average of $39.66 per month. Their contributions ceased altogether when the church moved to Ridgeville. The court believes this is a sufficient pattern to justify an inference that the Jeigulas would have continued to contribute at their $39.66 per month average for the 21 months between April 1986 and December 1987, and damages in that total amount, $832.66, will be allowed.

Esma Mabli. This parishioner gave $155.00 in January 1986, $59.51 in February, and $163.00 in March. She, too, ceased all contributions when the move to Ridgeville occurred in April. This is sufficient to warrant an award of 21 months at the average of $125.83, or $2,642.43.

Denise Jeigula. She gave $4.00 in January, nothing in February, and $50.00 in March 1986. This is not a sufficient basis for an inference as to what contribution she would have made but for the Evanston zoning ordinance, and no damages will be allowed.

George Smith. This parishioner gave $9.00 in January, $7.00 in February, and missed the month of March. After the move, he gave $5.00 in April, $5.00 in May, nothing in June and $5.00 in July, after which his contributions ceased altogether. This seems an adequate basis for an inference that his average contributions of $6.00 per month would have continued between August 1986 and December 1987. Plaintiff will be awarded damages on the basis of $6.00 per month for 17 months, or $102.00

Karen Lightfoot. Her contributions continued at about the same rate all through 1986, but she stopped attending when the church moved to Skokie. The move to Skokie was caused by the fact that defendant's zoning ordinance prevented plaintiff from renting a suitable facility in Evanston. Therefore, plaintiff is entitled to recover damages based on the contributions Karen Lightfoot would have made during the 12 months of 1987 had the church remained in Evanston. Her average contributions were $67.50, which, multiplied by 12, comes to $810.00

Taina Gordon. The same analysis applies to this friend of Karen Lightfoot. She stopped attending when the church moved to Skokie, and her average monthly contributions had been $105.40. Allowing plaintiff 12 months at $105.40 per month, the damages for the lost contributions of Taina Gordon come to $1,264.80.

II. VALUE OF MUSIC

Mr. and Mrs. Roberson provided music free of charge. The church had been paying $25.00 per week to musicians before the Robersons arrived. When the church moved to Skokie, the Robersons left the church. Therefore, the plaintiff is entitled to recover the value of the Robersons' donated services for the 52 weeks of 1987, which comes to $1,300.00.

III. POSTAGE AND ADVERTISING

The evidence fails to show that plaintiff's postage and advertising expenses were increased as a result of its inability to rent a suitable location in Evanston. Accordingly, no damages will be awarded for this item.

IV. OFFICE RENTAL

Plaintiff rented an office near Howard Street in Chicago because, according to Pastor Gill's testimony, a man at the Evanston zoning office told him that a special use permit was required for a church office as well as for a church itself. The ordinance does not so provide, and the court is inclined to believe that either Pastor Gill did not make his question clear to the man at the zoning office or else Pastor Gill misunderstood what he was told. In any event, plaintiff's theory of recovery would apparently have to be on the basis of misrepresentation, and no such theory is pleaded. Moreover, there is no evidence indicating that plaintiff paid more for the Chicago office space than it would have paid for the office portion of a combined church and office facility in Evanston. No damages will be allowed for office rent.

V. DISRUPTION AND INCONVENIENCE

The parties disagree as to whether a church is entitled to recover damages for the disruption and inconvenience caused by the constitutional violation. In relying on *Memphis Community School Dist. v. Stanchura*, ____ U.S. ____, 106 S.Ct. 2537 (1986), defendant seems to confuse damages for the abstract value of a constitutional right with damages for actual injury caused by the violation of that right. The court believes that plaintiff is entitled to recover damages for disruption and inconvenience caused by defendant's unconstitutional zoning ordinance (including any inconvenience involved in having an office at a location separate from the church) for the period of April 1986 through December 1987. *See City of Watseka v. Illinois Public Action Council*, 796 F.2d 1547, 1558-1559 (7th Cir. 1986). Plaintiff prays for $10,000.00, and the court believes the evidence justifies an award in this amount. Plaintiff will be allowed $10,000.00 for this item.

VI. PASTOR'S TIME AND EFFORT

Plaintiff seeks damages for the 432 hours Pastor Gill allegedly spent in 1986 seeking Evanston locations for Love Church. The evidence does not warrant such an award. Pastor Gill found suitable locations in April 1986, the first month he looked, and the remaining time he spent was unnecessary. The location presently occupied by the church is in the same block as those that were available in April 1986. It should have been apparent to Pastor Gill at an early date that no landlord was willing to enter into a lease contingent upon plaintiff's obtaining a special use permit for a church. In addition, the time spent appears excessive in any event. Four hundred thirty-two hours amounts to 54 eight-hour working days, and

it is difficult to understand why it should take this much time to check out the availability of possible church locations in the City of Evanston. No damages will be allowed for this item.

CONCLUSION

Plaintiff will be awarded $6,464.00 as compensation for lost contributions, $1,300.00 for the value of music services, and $10,000.00 for disruption and inconvenience, for a total damage award of $17,782.89. Judgment will be entered in that amount.

DATED: AUG 22, 1988

ENTER: /s/ JOHN F. GRADY
United States District Judge

APPENDIX C-1

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LOVE CHURCH, an Illinois not-for-profit Corporation, and MARZELL GILL, an individual	)	
Plaintiffs	)	NO.
vs.	)	
CITY OF EVANSTON, an Illinois Municipal Corporation	)	
Defendant.	)	

AFFIDAVIT

I, MARZELL GILL, being duly sworn, depose and state that:

1. I have personal knowledge of the facts stated herein, and if called to testify, would testify to the following:

2. The Love Church was incorporated in June, 1985, as an Illinois not-for-profit corporation, and has been meeting regularly in Evanston, Illinois from said time to this date.

3. The Love Church congregation is comprised of black, working class men and women between the ages of 18-35 who reside in Evanston and the Chicago area.

4. The Love Church is not affiliated with any denomination.

5. The Love Church believes in traditional Christian teachings centered on personal salvation through trust in Jesus and in the authority of the Bible.

6. Our church has some beliefs which differ from those of the large majority of American Christians, namely, Divine healing, speaking in tongues and the "charismatic" gifts.

7. Meeting together regularly for worship is a tenet of the faith of Love Church and is based on the biblical admonintum of Hebrew 10:25: "Let us not give up meeting together, as some are in the habit of doing, but let us encourage one another and all the more as you see the Day approaching."

8. Accordingly, the Love Church meets every Sunday for worship, singing of hymns, prayer, preaching and teaching of the Bible.

9. Since its formation, The Love Church has met temporarily at a variety of locations, including the Holiday Inn on Sherman Avenue in Evanston and at the Ridgeville Park District Building in Evanston.

10. Over approximately the last eight months, The Love Church has been attempting to lease a permanent meeting place in Evanston.

11. During this time, I have negotiated on behalf of The Love Church for the rental of several available properties in Evanston, including: 1014 Church Street; 1611 Sherman Avenue, managed by Shermerhorn Realtors; 828 Davis Street, managed by Imperial Realtors; and 821 Chicago Avenue, managed by Grad Realty.

12. In each case, the realtor (agent for owner) refused to enter into a lease agreement containing a zoning contingency clause that would remove the premises from the real estate market until The Love Church could obtain a special use permit from the City of Evanston, and which contingency clause would also void the lease agreement if the special use permit were denied.

13. As a result, the Love Church's inability to secure a permanent place, it has had to move from place to place frequently and average attendance has dropped from approximately 35 to approximately 15 people.

14. Due to the loss of membership, The Love Church has also suffered a loss of financial support from members' contributions.

15. As a result of its inability to find a proper location, The Love Church has been forced to meet in the home of one of the members.

16. This inability to secure a permanent meeting place has greatly hindered the Church's out reach to married couples, since there is no room for nursery facilities.

17. This inability to secure a permanent meeting place adequate for the church activities has also greatly obstructed the Church's mission of providing a place for those of common faith to meet and worship together.

IN WITNESS WHEREOF, I have signed this affidavit this 15th day of December, 1986.

/s/ MARZELL GILL JR.
MARZELL GILL

APPENDIX C-2

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LOVE CHURCH, an Illinois not-for-profit Corporation, and MARZELL GILL, an individual	)	
Plaintiffs,	)	No. 86 C 9850
vs.	)	
CITY OF EVANSTON, an Illinois Municipal Corporation	)	
Defendant.	)	

SUPPLEMENTAL AFFIDAVIT

I, Marzell Gill, being duly sworn on oath depose and state that I have personal knowledge of the facts stated herein and if called to testify would testify to the following:

(1) On at least four (4) occasions referred to in Plaintiff's original affidavit, Love Church found adequate available properties with affordable rent. But for the provisions of the Evanston Zoning Ordinance concerning churches and special use permits, Love Church was ready, willing and able to enter into a lease agreement with the owners of any one of the properties.

(2) Plaintiff, Love Church as a result of its inability to secure an adequate permanent meeting place, has been meeting in a two-bedroom apartment containing

approximately 900 s.f. for two months. Attendance at our services at one time reached a high of 250 people when we met at the Holiday Inn on Sheridan Avenue;

(3) Membership in Love Church has now dwindled to 11 adult members since the original affidavit was filed due in substantial part to our inability to obtain a decent meeting place;

(4) During this time, young children of Love Church members have been huddled into a single bedroom for nursery care and Sunday school. As many as 7 children have been in a bedroom at one time;

(5) The cramped quarters in which Love Church has been meeting has made it impossible for the Sunday school to engage in its normal activities of singing and doing children's handicrafts;

(6) The cramped meeting conditions also made it impossible for the adult members of Love Church to worship with the freedom and enthusiasm they normally express when meeting in larger more adequate facilities.

(7) As a result of these conditions, Love Church has been forced to seek a temporary meeting place outside of Evanston at the Holiday Inn, 5300 West Touhy in Skokie. However, Love Church still strongly desires to establish a permanent meeting place in Evanston where most of its members live.

/s/ MARZELL GILL JR.
Marzell Gill

[Notarization omitted in printing.]